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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 225

LEWIS A. JOHNSON Alias LEWIS O. KALAP,
Petitioner,

vs.

W. BRUCE MATTHEWS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Joseph L. Rauh, Jr.,
Irving J. Levy,
Mitchell J. Cooper,
Attorneys for Petitioner,
Acting on Behalf of the
American Civil Liberties Union.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the District Court dismissing his petition for a writ of *habeas corpus*.

Opinions Below

The order of the District Court dismissing petitioner's petition for a writ of *habeas corpus* and ordering his extradition to the State of Georgia was filed August 3, 1949 (R. 17). The opinion of the Court of Appeals (R. 21) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1950 (R. 38). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254.

Question Presented

The sole question presented by this petition is whether, in an extradition proceeding, a court in the asylum state should afford a hearing to a petitioner for a writ of *habeas corpus* upon allegations, not controverted, that officials of the demanding state, in violation of the Fourteenth Amendment, had held petitioner in the jails of the demanding state for 10 months without preliminary hearing, indictment or trial, during which time he "was the victim of cruel, barbaric, and inhuman treatment, in that, he was most severely beaten, starved, denied clothing or bedding by his jailors, this placing his life and health in grave jeopardy."

Statutes Involved

The pertinent provisions of the Constitution and statutes involved in this case are set out in the Appendix.

Statement

On January 5, 1948 petitioner was arrested and incarcerated in the jail at Ocilla, Georgia, on a charge of robbery (R. 13). He remained thus incarcerated without preliminary hearing, indictment or trial for a period of 10 months (R. 13). On November 3, 1948 he effected his escape (R. 13). On May 25, 1949 petitioner was apprehended in the District of Columbia on the basis of a fugitive warrant issued by the State of Georgia and on July 7, 1949 he was ordered extradited to Georgia by Judge Bailey of the United States District Court for the District of Columbia (R. 4).

Petitioner thereupon filed a petition for a writ of *habeas corpus,* alleging *inter alia* that he had been confined in jail in Georgia for ten months without preliminary hear-

ing, indictment[1] or trial; that during his incarceration three terms of court were held and passed without trial; that during that period the Solicitor General and the Sheriff expended every effort to obtain the sum of Twenty-Five Hundred Dollars from his wife; and that during these ten months he "was moved to three (3) different jails where he was the victim of cruel, barbaric and inhuman treatment, in that, he was most severely beaten, starved, denied clothing or bedding by his jailors, this placing his life and health in grave jeopardy" (R. 13-14).

The writ was ordered to issue on July 7, 1949 (R. 15). The matter was brought on to be heard on July 8, 1949, at which time the District Court declined to hear evidence as to petitioner's allegations of his treatment in Georgia (R. 3-12), holding that the constitutional questions raised by him could be asserted only in the State and Federal courts of Georgia (R. 17). On August 3, 1949, the District Court ordered that the writ be discharged and the petition dismissed (R. 17).

On August 3, 1949 petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit (R. [illegible]). Oral argument was waived and the case was submitted on January 16, 1950 (R. 21). On May 1, 1950 the Court of Appeals, one judge dissenting, affirmed the judgment of the District Court, holding that a court in the asylum State cannot hear and determine the constitutional validity of phases of the penal action by the demanding state (R. 21-33). The dissenting judge was of the view that the infliction of cruel and unusual punishment

[1] The majority opinion below indicates that a certified copy of an indictment returned against petitioner on February 16, 1948, was among the extradition papers (R. 21). Assuming this to be the fact, there is no reason to believe that petitioner's jailors ever told him of the indictment. At any rate, on the allegations of the petition, which must be accepted as true for purposes of appeal, petitioner never received a preliminary hearing or a trial.

by the demanding state is an abrogation of an individual's fundamental constitutional rights requiring that the case be remanded to the District Court for a hearing on the merits of petitioner's allegations of cruel and unusual punishment and for a determination whether he is likely to undergo similar abuse if extradited (R. 33-37).

The Court of Appeals has ordered the mandate stayed to and including July 30, 1950, pending the filing of this petition.

Specification of Errors to Be Urged

1. The court below erred in holding that a petitioner for a writ of *habeas corpus* in an extradition proceeding was not entitled to a hearing in the courts of the asylum state upon allegations, not controverted,[2] that the officials of the demanding state, in violation of the Fourteenth Amendment, had held petitioner in the jails of the demanding state for 10 months without preliminary hearing, indictment or trial, during which time he "was the victim of cruel, barbaric and inhuman treatment, in that, he was most severely beaten, starved, denied clothing or bedding by the jailors, this placing his life and health in grave jeopardy."

2. The court below erred in holding that the courts of the asylum state in an extradition proceeding cannot hear and determine the constitutional validity of any phases of the penal action by the demanding state.

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[2] Since the petition was dismissed without hearing any evidence, the allegations must be accepted as true for purposes of appeal.

Reasons for Granting the Writ

I

The decision of the court below is in direct conflict with the decision of the Court of Appeals for the Third Circuit in Johnson v. *Dye.*

The decision of the majority of the court below is in direct conflict with the decision of the Court of Appeals for the Third Circuit in the case of *Johnson* v. *Dye,* 175 F. (2d) 250. The majority of the court below expressly recognized this conflict, concluding its opinion with the statement that "we find ourselves in disagreement with the United States Court of Appeals for the Third Circuit in its opinion in *Johnson* v. *Dye*" (R. 33).

The majority of the court below squarely held that no matter how severe the violation of petitioner's constitutional rights by the State of Georgia, nor how cruel and unusual his treatment had been and might be again if extradited to Georgia, those questions could not be raised in an extradition proceeding but could only be tested in Georgia after his extradition there. In the words of the dissenting judge below, the majority's ruling means that "even if petitioner can prove, in a hearing on the merits . . . that he will never get to trial in Georgia, or that he will not get access to *any* court in that state because of the cruel and unusual punishment which may cause his death before that time, his release could not be secured on *habeas corpus*" (R. 34). The majority apparently accepted this interpretation of its action, stating flatly that the test of the "constitutional validity of his treatment by Georgia authorities . . . cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged" (R. 26). The court therefore affirmed the dismissal of the petition for a writ of *habeas corpus.*

In *Johnson* v. *Dye,* on allegations practically indistinguishable from those in the case at bar, the Court of Appeals for the Third Circuit ordered the writ of *habeas corpus* to issue and the petitioner discharged. The court held that the cruel and unusual punishment inflicted by the State of Georgia violated the due process clause of the Fourteenth Amendment and entitled the escaped prisoner to his freedom. The court, sitting *en banc,* concluded its opinion on this point as follows:

> "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty . . . An obligation not to inflict cruel and unusual punishment laid upon a State by the Constitution of the United States must be deemed to be positive and binding . . . In the instant case, cruel and unusual punishment already has been inflicted on Johnson as the court below found. History is as potent a force as anticipation. It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity." (175 F. (2d) at 256) [3]

The direct conflict between the case at bar and the decision of the Third Circuit Court of Appeals in *Johnson* v. *Dye* is in no way affected by this Court's action in that case. *Johnson* v. *Dye* was reversed by this Court in a per curiam

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[3] Petitioner's allegations in the case at bar would constitute an *a fortiori* case based upon the ruling of the Third Circuit in *Johnson* v. *Dye.* In *Johnson* v. *Dye* the cruel and unusual punishment occurred during the course of a term of imprisonment after conviction for the crime of murder. In the case at bar, there are not only allegations of cruel and unusual punishment in the jails of Georgia while awaiting trial, but there are also allegations relating to the failure of the State of Georgia to provide a speedy and public trial, a fundamental right protected by the due process clause of the Fourteenth Amendment (Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97; *Palko* v. *Connecticut,* 302 U. S. 319). Indeed, the cruel and inhuman treatment of petitioner might frustrate his opportunity for a fair trial on the charge for which he was arrested.

opinion (338 U. S. 864) which merely cited *Ex parte Hawk*, 321 U. S. 114. The dissenting judge below properly regarded the reversal in *Johnson* v. *Dye* as being based upon petitioner's failure to exhaust his remedies in the state courts of Pennsylvania, the asylum state, before seeking a writ of *habeas corpus* in the federal district court in Pennsylvania.[4] The petitioner in *Johnson* v. *Dye* had started proceedings for a writ of *habeas corpus* in the state courts of Pennsylvania. He did not appeal to the Supreme Court of Pennsylvania from an adverse decision by the Superior Court of Pennsylvania, but instead thereupon commenced new proceedings for the writ in the United States District Court in Pennsylvania. This was clearly error under this Court's ruling in the *Hawk* case that all remedies in the state courts must be exhausted before a petition for *habeas corpus* could be brought in the federal courts. The *Hawk* decision was therefore applicable to *Johnson* v. *Dye*, since further state court remedies were available to the petitioner in Pennsylvania.

The majority of the court below incorrectly interpreted the reference to *Ex parte Hawk* to mean that the petitioner must first exhaust his remedies in the courts of the demanding state in extradition proceedings before he may seek relief in the federal courts of the asylum state. But *Ex parte Hawk* did not involve any question of extradition or of exhaustion of remedies in the courts of a state other than the one in which the federal court was sitting. The question of exhausting remedies in the state courts of the asylum state was involved in *Johnson* v. *Dye* and the Third Circuit expressly found that exhaustion of state court remedies was unnecessary. The reference to *Ex parte Hawk* by this Court can thus be regarded only as a rejec-

[4] Since this case is in the District of Columbia, it does not present the problem of exhausting remedies in the state courts before proceeding in the federal courts.

tion of the view that the state courts of the asylum state need not be resorted to before seeking relief in the federal courts there.[5]

There is a further patent error in the suggestion by the majority of the court below that this Court's reference to *Ex parte Hawk* in reversing *Johnson* v. *Dye* constituted a direction to the petitioner there to apply to the state courts of Georgia. If that had been the intendment of this Court's decision reversing *Johnson* v. *Dye*, it would have constituted a decision on the merits; the petitioner would have had to go to Georgia and surrender himself up to the state authorities in order to test the constitutional validity of his treatment in their courts. It is hardly to be assumed that this Court would have made such a far-reaching decision without receiving briefs, hearing argument, or writing an opinion. Indeed, the majority of the court below seems to recognize

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[5] In *Jackson* v. *Ruthazer*, 181 F. (2d) 588 in which this Court denied certiorari on June 5, 1950, the Second Circuit so construed the decision in *Johnson* v. *Dye*. In the *Jackson* case the petitioner was extradited to Georgia, the federal court denying the writ of *habeas corpus* for the reason that he had had a full hearing in the courts of New York, the asylum state, on his allegations of cruel and unusual punishment. On the basis of the full hearing granted by the state courts, during which witnesses for the State of Georgia testified and were cross-examined, the allegations of cruel and unusual punishment were found to be without merit. There was no reason for the federal courts to intervene. The Second Circuit did not hold that absent an opportunity for a hearing in the courts of the asylum state the writ would be denied upon uncontroverted allegations of cruel and unusual punishment. The Second Circuit assumed for its purposes that *Johnson* v. *Dye* was correctly decided "except for the exhaustion of state remedies point" on which point the Third Circuit in *Johnson* v. *Dye* expressly held that there was no necessity to exhaust the judicial remedies in courts of the asylum state. The state court by affording the prisoner a full hearing on the question of cruel and unusual punishment was apparently of the view that if the allegations were established the prisoner would be released. *Peo. ex rel. Jackson* v. *Ruthazer*, 196 N. Y. Misc. 34, 90 N. Y. S. (2d) 205, aff'd without opinion 276 App. Div. 832; leave to appeal den. 300 N. Y. —, 90 N.E. (2d) 69.

that this Court made no such decision on the merits; otherwise the court below would have had nothing to do except cite this Court's opinion. Instead, the majority below analyzed *Johnson* v. *Dye* at length and concluded that it found itself in disagreement with the opinion of the Third Circuit.

There is thus nothing in the action of this Court reversing *Johnson* v. *Dye* which in any way diminishes its authority upon the question presented here. The conflict is complete and direct and certiorari is fully warranted to resolve that conflict.

II

The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

(a) The majority opinion below decides that in *habeas corpus* proceedings to test the legality of detention by an asylum state for extradition purposes the court may not consider "the validity of the original or the contemplated incarceration in the demanding state" (R. 23). This, of course, is precisely contrary to what was held by the Third Circuit in *Johnson* v. *Dye*. Five of the six judges who heard that case were of the view that the violation of petitioner's constitutional rights by the demanding state in its past treatment of him was enough to defeat the demand for extradition and to require his release from detention. Judge O'Connell, concurring, was of the view that the writ should issue, if the past treatment of the petitioner by the State of Georgia made it reasonably likely that he would in the future be subjected to treatment which would violate basic constitutional rights. This Court has not passed upon the question of the scope of the permissible issues on a petition for *habeas corpus* in which it is established that the demanding state has in the course of criminal proceed-

ings, for the continuation of which it seeks petitioner's extradition, abridged a fundamental right of the prisoner.

If the majority of the court below is correct, it would mean that the extradition provision of the Constitution requires extradition to a state even where the result of such action would be to defeat fundamental rights guaranteed by the Constitution itself. This Court has never approved any such principle.

The majority below was of the view that the extradition clause is a "procedural provision" which cannot "impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights" (R. 28). The dissenting judge held that there was a direct conflict between the constitutional provision providing for extradition and the provisions protecting an individual from cruel and unusual punishment and guaranteeing him the right to receive due process of law. The Third Circuit, in *Johnson* v. *Dye*, held that a state which has failed to comply with its constitutional duty to treat convicts with "decency and humanity" cannot call upon another sovereign state to yield up a prisoner as a "fugitive from justice" under the extradition provisions of the Constitution and the Federal statute which implements it. These conflicting views plainly present a question of large constitutional import upon which this Court has not yet passed. The question is one of the relations between the States and between the States and the Federal Government, an area in which confusion and uncertainty should be removed by an authoritative decision of this Court.

(b) The majority opinion below does not pass upon the question whether the due process clause of the Fourteenth Amendment protects a person from cruel and unusual punishment by a state in the exercise of its governmental powers. The Third Circuit, in *Johnson* v. *Dye*, found this

right to be so basic and fundamental as to be included within the protection of the Fourteenth Amendment. This Court has not passed upon the precise question, but it is one which has been recognized by this Court to be of fundamental importance. In *State of Louisiana ex rel Francis* v. *Resweber,* 329 U. S. 459, this Court was apparently of the opinion that the Fourteenth Amendment would prohibit execution of a prisoner by a state in a cruel manner just as the Eighth Amendment would restrain the Federal Government from so doing. Although this Court has refused to extend the scope of the Fourteenth Amendment to protect *all* the rights, privileges and immunities secured by the Bill of Rights against state invasion (*Palko* v. *Connecticut,* 302 U. S. 319; *Adamson* v. *California,* 332 U. S. 46), the Court has made it abundantly clear that the Fourteenth Amendment does apply to protect an individual against state infringement of rights so basic and fundamental to life and liberty as to be included within minimal standards of fairness and justice (*Snyder* v. *Massachusetts,* 291 U. S. 97; *Hebert* v. *Louisiana,* 272 U. S. 312). The allegations in the petition of beating, starvation, the denial of clothing and bedding, the failure to bring the case on to trial, the attempt of state officials to obtain money from the wife of the prisoner, would certainly embrace treatment which "offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, at 105.

The question has arisen frequently enough so that this Court should indicate by a definitive decision whether cruel and barbaric treatment of prisoners, so often claimed to occur in the operation of state penal systems, offends rights and privileges protected by our Federal Constitution.

(c) If the due process clause of the Fourteenth Amendment does afford protection against the infliction by the state of cruel and unusual punishment of prisoners,

another important federal question is presented which this Court should resolve. The dissenting judge below was properly of the view that the case presented the problem of reconciling the constitutional provision for extradition of fugitives with the constitutional protection against state impairment of fundamental rights. The decision in *Johnson* v. *Dye* limited the extradition clause to situations in which its invocation would not result in the denial of justice as defined by due process of law. It is submitted that this view is correct. If the law were otherwise the provision for extradition in the Constitution could be made a vehicle for the denial of those fundamental rights which the Constitution unequivocally guarantees to all. Just as other powers granted or reserved to states are qualified by the fundamental protections afforded by the Fourteenth Amendment (see *Scott* v. *McNeal*, 154 U.S. 34, 45; *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36), so is the extradition provision limited. In any event, the decision in *Johnson* v. *Dye* and the opinions below indicate that there is an important question presented of reconciling the requirement of Article IV, Section 2, Clause 2 of the Constitution with the Fourteenth Amendment in a case where they seemingly clash. This Court has not had occasion to decide the question and it is one which is squarely raised by this petition.

Conclusion

This Court granted certiorari in *Johnson* v. *Dye,* but its decision did not resolve the important issues raised by that case. Those same important issues are presented to this Court by this petition for certiorari together with a conflict between circuit courts of appeals. It is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH L. RAUH, JR.,
IRVING J. LEVY,
MITCHELL J. COOPER,
Attorneys for Petitioner,
Acting on Behalf of the
American Civil Liberties Union.

APPENDIX

Article IV, Section 2 of the United States Constitution:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
>
> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
>
> "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Amendment XIV, Section 1, of the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 18, United States Code, § 3182:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, fel-

ony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 225

LEWIS A. JOHNSON, ALIAS LEWIS O. KALAP,
PETITIONER

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The majority (R. 21-33) and dissenting (R. 33-37) opinions in the Court of Appeals are not yet reported. No opinion was filed in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1950 (R. 38). The petition for a

writ of certiorari was filed on July 28, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after issuance of a warrant of extradition, a court in the asylum jurisdiction is required, on petition for writ of habeas corpus, to hear and determine contentions that officers of the demanding state subjected the prisoner to severe physical abuse prior to his escape from detention in that state.

STATUTE INVOLVED

18 U.S.C. 3182 provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent

appears within thirty days from the time of the arrest, the prisoner may be discharged.

STATEMENT

On July 7, 1949, Judge Bailey as the Chief Judge of the United States District Court for the District of Columbia [1] ordered that petitioner be extradited to Georgia for trial on a charge of robbery (R. 4, 13). On the same day and in the same court petitioner filed a petition for habeas corpus against the United States Marshal holding him in custody, alleging, *inter alia,* that after his arrest at Ocilla, Georgia on January 5, 1948, he remained in jail without preliminary hearing, indictment,[2] or trial until November 3, 1948, when he escaped; that during his incarceration three terms of court passed without his trial; that during this period state officials made attempts to obtain $2500 from his wife, allegedly to recompense the complaining witness in the robbery charge; that while so held he was the

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[1] 23 D.C. Code (1940 ed.) 401 provides:

"In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Justice of the District Court of the United States for the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of [18 U.S.C. 3182] * * *."

[2] The majority opinion of the Court of Appeals states: "This allegation [that petitioner was not indicted] was false on the face of the papers. He was arrested January 5, 1948. A certified copy of an indictment returned against him on February 16, 1948, is among the extradition papers" (R. 21, footnote 1).

"victim of cruel, barbaric, and inhuman treatment, in that, he was most severely beaten, starved, denied clothing or bedding by his jailors, this placing his life and health in grave jeopardy"; and that the treatment he received violated the 14th Amendment of the United States Constitution and Sections 2-103 and 2-105 of the Georgia Constitution [3] (R. 13-14).

The district court forthwith issued the writ (R. 15). On the return day, counsel for petitioner offered to prove the allegations of the petition by testimony of the petitioner and one corroborative witness, together with four letters, which were described as relevant only to the issue whether state officials had sought to obtain $2500 from petitioner or his wife (R. 7). During argument counsel for petitioner first admitted that if petitioner were extradited to Georgia, he would have access to the federal courts there, which would be competent to try and determine the allegations of the petition.[4] He later sought to qualify that admission by suggesting that petitioner's poverty might preclude such access, but he made no contention that state officials would do anything to impair petitioner's right of access to state or federal courts in Georgia on writ of habeas corpus to test any asserted violation of

[3] These sections of the Georgia Constitution are similar to the Fifth and Sixth Amendments of the United States Constitution (see R. 3).

[4] "The COURT. If he wants recourse to Federal Court can't he have it there?

"Mr. SHAPIRO. Yes, Your Honor, he can." (R. 8)

constitutional rights.[5] The district court accordingly, without taking evidence, ordered the writ discharged and the petition dismissed, stating that "the petitioner is held under due extradition process, and . . . the constitutional questions raised by him can be properly asserted in the courts of the State of Georgia, or, if necessary, in the Federal Courts of that jurisdiction." (R. 17.)

On appeal (R. 19) this judgment was affirmed (R. 38). The majority (R. 21-33) held that the district court, sitting in the asylum jurisdiction, should not hear and determine questions as to the

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[5] "The COURT. If he has rights which ought to be protected by a Federal Court, and which he has access to and as you say should have access to, why can't he have access to the Court?

"Mr. SHAPIRO. He should; I definitely agree with Your Honor that he should, if we can keep him from the custody of the State courts. I don't say that we should not return him back to Georgia if we can get him an immediate hearing before the Federal jurisdiction there.

"The COURT. You know perfectly well if he is taken back to the State of Georgia under this writ of extradition which Judge Bailey issued he can apply for a writ of habeas corpus in a Federal Court there, and the fact that he is in custody is not going to keep him from applying.

"Mr. SHAPIRO. Except for one thing: The man is proverty stricken, Your Honor.

"The COURT. He can go in in forma pauperis.

"Mr. SHAPIRO. That's true but will he be given opportunity to do so, Your Honor?

"The COURT. Well, somebody on his behalf can certainly do it. Lots of writs of habeas corpus are filed before a man is brought into court. That is the object of the writ.

"Mr. SHAPIRO. Is Your Honor ruling that he won't hear this?

"The COURT. I am not ruling at all; I am asking you on what basis you are asking me to make the ruling?

"Mr. SHAPIRO. I have given you all I have to say." (R. 9-10).

constitutional validity of petitioner's penal treatment by Georgia as the demanding state. Judge Bazelon, dissenting (R. 33-37), thought that evidence should have been taken on the question whether petitioner had suffered cruel and unusual punishment and "would be reasonably likely to undergo similar abuse if he were returned to Georgia." (R. 37)

DISCUSSION

The range of inquiry open in extradition matters to a court in the asylum jurisdiction on petition for habeas corpus has traditionally been very limited. The court can determine whether the detaining papers are in proper form (*Compton* v. *Alabama,* 214 U. S. 1, 6; *Roberts* v. *Reilly,* 116 U. S. 80, 95), whether they disclose that a crime has been charged in the demanding state (*In the Matter of Strauss,* 197 U. S. 324, 329-331; *Ex parte Reggel,* 114 U. S. 642, 649), whether the party sought to be extradited was present in the demanding state at the time the crime is alleged to have been committed (*Biddinger* v. *Commissioner of Police,* 245 U. S. 128, 135; *Hyatt* v. *Corkran,* 188 U. S. 691, 711-713, 719), and whether he is the same person who is charged with the crime (*Raftery ex rel. Huie Fong* v. *Bligh,* 55 F. 2d 189, 193 (C. A. 1); *United States ex rel. Austin* v. *Williams,* 12 F. 2d 66, 67 (C. A. 5)). However, the court cannot con-

sider defenses generally,[6] insanity of the accused (*Drew* v. *Thaw*, 235 U. S. 432, 439-440), the statute of limitations (*Biddinger* v. *Commissioner of Police, supra*, 245 U. S. at 134-135; *Pelley* v. *Colpoys*, 122 F. 2d 12, 14-15 (C. A. D. C.), certiorari denied, 314 U. S. 622), an alibi (*Munsey* v. *Clough*, 196 U. S. 364, 375), the guilt or innocence of the accused (*South Carolina* v. *Bailey*, 289 U. S. 412, 420; *Munsey* v. *Clough, supra*, 196 U. S. at 375), former jeopardy (*In re Bloch*, 87 Fed. 981, 984 (W. D. Ark.), the motives behind the extradition proceedings (*Pelley* v. *Colpoys, supra*, 122 F. 2d at 14; *Person* v. *Morrow*, 108 F. 2d 838, 840 (C. A. 10)), and equitable considerations raised in bar of prosecution in the demanding state. *Reed* v. *Colpoys*, 99 F. 2d 396, 399 (C. A. D. C.), certiorari denied, 305 U. S. 598. Nor can the court inquire into the constitutionality of the statute under which the accused is charged (*Pearce* v. *Texas*, 155 U. S. 311, 314; *Collins* v. *Traeger*, 27 F. 2d 842, 846 (C. A. 9)), or of the grand jury which indicted him. (*Hale* v. *Crawford*, 65 F. 2d 739, 741-744 (C. A. 1), certiorari denied, 290 U. S. 674).

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[6] *Biddinger* v. *Commissioner of Police, supra*, 245 U.S. at 135:

"This much, however, the decisions of this court make clear * * * frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State."

These cases clearly established the rule, stated by the majority below, that the petition for habeas corpus tests only the validity of the detention in the asylum state and "does not test the validity of the original or contemplated incarceration in the demanding state" (R. 23). In *Johnson* v. *Dye*, 175 F. 2d 250, reversed, 338 U. S. 864, the Court of Appeals for the Third Circuit, sitting *en banc*, announced an exception to this rule. Finding, on the evidence presented in that case, that the petitioner had been "subjected to cruel and unusual punishment following his conviction" (p. 255), it held that such a finding required the release of the prisoner, stating that "the obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty" (p. 256). The concurring judge rested decision on the narrower ground that the record indicated that the petitioner had not only suffered past cruelty but also faced "grave and imminent danger of like abuse and very possibly even death by extra-legal means, if he is returned to Georgia" (p. 258).[7]

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[7] In *U. S. ex rel. Jackson* v. *Ruthazer*, 181 F. 2d 588, the Court of Appeals for the Second Circuit found it unnecessary to indicate its agreement or disagreement with *Johnson* v. *Dye* because it held that the petitioner had had a full and fair hearing in the state courts of New York at which it was determined that his contentions of brutal treatment by officers of the State of Georgia were unfounded. Accordingly, it held that the petitioner was not entitled to a rehearing of these contentions in the federal courts. In *U. S. ex rel. Brown* v. *Cooke*, 209 Fed. 607, 608, dismissed, 238 U.S. 613, the Court of

The majority opinion below expressly disapproves of the decision in *Johnson* v. *Dye* (R. 33), and there is no doubt that the opinions in the two cases are inconsistent in principle. The force of *Johnson* v. *Dye* as a precedent is, however, questionable in view of this Court's summary reversal of the decision. In its *per curiam* memorandum this Court cited only *Ex parte Hawk,* 321 U. S. 114. The basis of its reversal was thus presumably that since petitioner had not exhausted available state court remedies, his application to the federal court was premature. The opinion did not indicate whether the state court remedies which must be exhausted were limited to those in Pennsylvania, the asylum state, or included those in Georgia, the demanding state.[8] The Court of Appeals for the Second Circuit in *U. S. ex rel. Jackson* v. *Ruthazer,* 181 F. 2d 588, and the dissenting judge below, have construed this Court's

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Appeals for the Third Circuit had previously expressed a view opposed to that later adopted in *Johnson* v. *Dye,* stating that arguments that the relator "is not likely to have a fair trial —and probably will not have a trial at all—in the courts of the demanding state" could not be considered. It added, however, that the petitioner's contentions were met in any event by explicit assurances given by representatives of the demanding state.

[8] In the briefs before this Court in *Johnson* v. *Dye,* both contentions had been made. Counsel for the State of Pennsylvania contended that, in view of the petitioner's failure to make appropriate application to the Supreme Court of that state, his application to the federal court in Pennsylvania was premature. The State of Georgia, appearing *amicus curiae,* contended that there must also be an exhaustion of state court remedies in Georgia, or a showing that such remedies were unavailable.

opinion as resting the reversal solely on the ground of the failure to exhaust available remedies in the Pennsylvania state courts.[9] On the other hand, the majority below regarded this Court's reversal of *Johnson* v. *Dye* as resting also on the availability of appropriate remedies in the state courts of Georgia, which thus removed the necessity of intervention by any federal court at this stage.

The present case differs significantly from *Johnson* v. *Dye* on its facts. In *Johnson* v. *Dye,* the petition for habeas corpus alleged that the petitioner, a Negro, feared that in the event of his return to Georgia, he would "meet his death by mob violence or be so brutalized and tortured by his jailors that he [would] succumb" (Record in No. 332, October Term, 1949, p. 5). In support of that allegation he introduced testimony of a large number of escaped Georgia convicts with respect to alleged brutality of treatment by Georgia of its prisoners and especially of Negro prisoners. The showing made was such that in the view of the concurring judge it would have been "ingenuous" to assume that upon the petitioner's return to Georgia his constitutional rights, including his right of access to state or federal courts in Georgia to vindicate those rights, would be respected by the Georgia

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[9] Since the present case arises in the District of Columbia, no question of exhaustion of state court remedies in the asylum jurisdiction is presented.

authorities (175 F. 2d at 258). In the present case the petition for habeas corpus makes no assertion that petitioner's right of access to state or federal courts in Georgia will be impaired if he is extradited, and indeed his counsel not only made no such contention before the district court, but in effect admitted that the only impediment to such access would be the petitioner's poverty.

In *Ex parte Hawk, supra,* this Court reiterated the rule that federal courts "will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist' " (321 U. S. at 117). It pointed out that such exceptional cases might arise where the state either failed to afford a remedy or where the remedy afforded proved in practice unavailable or seriously inadequate (321 U. S. at 118).[10] This rule rests on the view that the jurisdiction of a federal district court to condemn a "state's system for the administration of justice . . . as constitutionally inadequate" (*Darr* v. *Burford,* 339 U. S. 200, 217) should, as a matter of comity and orderly judicial administration, be exercised only where it is clear

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[10] Cf. 28 U. S. C. 2254, allowing federal court intervention by habeas corpus where there has been either exhaustion of state remedies or "an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

that the petitioner would otherwise be remediless. Although evolved in connection with applications to a federal court sitting in the state whose administration of justice is attacked, it applies *a fortiori* to the question here presented whether a federal court sitting in the asylum jurisdiction should inquire into the constitutional adequacy of the administration of justice in the demanding jurisdiction. The strong reasons of comity and convenience which require that ordinarily such issues be left to the state courts, and if necessary the federal courts, in the demanding state are set forth in the majority opinion below.

On its facts (and apart from the question of the exhaustion of remedies in the Pennsylvania state courts) *Johnson* v. *Dye* raised the issue whether a substantial showing that the prisoner, should he be returned to the demanding state, would be effectively denied access to any court in that state constitutes the exceptional case which warrants intervention by a federal court. Cf. *Moore* v. *Dempsey,* 261 U. S. 86. If the present case raised that issue, a serious question would be presented. But we think it clear on the present record that no question of the nonavailability of adequate remedies in Georgia was raised in the courts below. Since the force of the opinion in *Johnson* v. *Dye* as a precedent has been impaired by this Court's reversal of that decision, and since the result of

the present case is clearly in accord with settled principles, we believe that this Court would be justified in denying the petition.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
JAMES L. MORRISSON,
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

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